ORIGINAL

EX PARTE OR LATE FILED

CTIA
Building The Wireless Future™
Cellular Telecommunications Industry Association

June 21, 2000

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W.
12th Street Lobby, TW-A325
Washington, DC 20554

RECEIVED
JUN 21 2000
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: **Ex Parte *Presentation***
CC Docket No. 99-263

Dear Ms. Salas:

On June 20, 2000, the Cellular Telecommunications Industry Association ("CTIA") represented by Michael Altschul, Vice President/ General Counsel and Lolita Smith, Staff Counsel, along with Bruce Beard, General Attorney, SBC Wireless, and David Gross, representing Vodafone and Verizon Wireless, in four separate meetings met with Adam Krinsky, Legal Advisor to Commissioner Tristani, Brian Tramont, Legal Advisor to Commissioner Furchtgott-Roth, Mark Schneider, Senior Legal Advisor to Commissioner Ness, and Clint Odom, Legal Advisor to Chairman Kennard. The parties discussed the Wireless Consumer Alliance, Inc. ("WCA") Petition which seeks a declaratory ruling from the FCC on the question of whether the Communications Act, and the FCC's jurisdiction thereunder, preempt state courts from awarding monetary relief against CMRS providers in certain circumstances. The parties' comments were consistent with those raised in their pleadings in WT Docket No. 99-263, and are set forth in the written ex parte submission attached hereto.

Pursuant to Section 1.1206 of the Commission's Rules, an original and one copy of this letter is being filed with your office. If you have any questions concerning this submission, please contact the undersigned.

Sincerely,

Dustun L. Ashton

Dustun L. Ashton

No. of Copies rec'd 0+1
List A B C D E

Safety-
Your most important call

1250 Connecticut Avenue, NW Suite 800 Washington, DC 20036 202.785.0081 phone 202.785.0721 fax www.wow-com.com

RECEIVED
JUN 21 2000
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Wireless Consumers Alliance, Inc.	)	WT Docket No. 99-263
	)	
Petition For a Declaratory Ruling Concerning Preemption of State Court Awards of Monetary Relief Against Commercial Mobile Radio Service Providers	)	

Ex Parte PRESENTATION OF THE CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION

The U.S. Supreme Court has made clear that a state court order awarding a remedy of a rate rebate is the same for purposes of federal preemption analysis as is a state legislative act of rate regulation. San Diego Building Trades Council v. Garmon, 359 U.S. 236, 247 (1959) ("regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy."). Numerous federal and state courts have rejected state court claims for damages against carriers where the award of damages would effectively constitute impermissible state rate regulation.

- **Bastien v. AT&T Wireless Services, Inc.**, 205 F.3d 983 (7th Cir. 2000). Claim against AT&T based on allegations that the carrier had allegedly failed to construct a wireless infrastructure necessary for reliable service but nonetheless continued to market and sell service to consumers sought, in effect, state regulation of rates and entry, which is barred by Section 332(c)(3).

- **Ball v. GTE Mobilenet of California Ltd.**, 3 Civil C031783 (Cal. Ct. of Appeals, 3rd App. Dist. (Sacramento) June 8, 2000). Plaintiff's claims that carriers' actions resulted "in subscribers ... being overcharged for service" were dismissed under Section 332; plaintiff's claims of inadequate disclosure of billing practices were not dismissed; Court of Appeals held that plaintiff's could obtain injunctive relief for inadequate disclosures, but that plaintiff's "generically phrased restitution requests ... may be more problematic."

- **Powers v. AirTouch Cellular**, No. N71816 (Cal. Super. Ct. (San Diego County) Oct. 6, 1997). Plaintiff's claims (based on alleged inadequate disclosure) that it had been damaged by defendant's methods of determining or calculating the quantity of airtime usage were preempted because plaintiff's "allegations constitute direct challenges to the calculation of the rates charge[d] by defendant AirTouch for cellular telephone service."

- **In re Comcast Cellular Telecom. Litigation**, 949 F. Supp. 1193 (E.D. Pa. 1996). Claims of breach of the implied duty of good faith and fair dealing, unjust enrichment, and restitution, based on the carrier's practice regarding the measurement of call length, were preempted by Section 332(c)(3) because they were "a direct challenge to the calculation of the rates charged by Comcast" for cellular service. "It is undisputed that like legislative or administrative action, judicial action constitutes a form of state regulation. Thus, like legislative or regulatory action, state court adjudications threaten the uniformity of regulation envisioned by a congressional scheme."

- **Simons v. GTE Mobilnet, Inc.**, No. H-95-5169 (S.D. Tex. Apr. 11, 1996). "[A]ll state law claims related to the field of rate regulation are completely preempted by section 332(c)(3)(A)."

In a number of cases, the prohibition against judicial rate regulation stems from the "nonjusticiability" strands of the filed rate doctrine, which is aimed at preserving the exclusive role of federal agencies in approving rates for telecommunications services that are "reasonable" by keeping courts out of the rate-making process. The purpose of Section 332 is identical to the purpose of the nonjusticiability provision of the filed rate doctrine, and thus filed rate cases that define when a court ventures into the zone of impermissible rate-making are equally instructive in determining when a state court has engaged in prohibited regulation of CMRS rates.

- **AT&T Corp. v. Central Office Telephone, Inc.**, 524 U.S. 214, 118 S. Ct. 1956 (1998). Long distance resellers alleged that AT&T violated state contract and tort law by promising, but never providing, various service and billing options, but the U.S. Supreme Court found that both claims fell within the exclusive preserve of the FCC because they involved rate setting. The Court found that rates "do not exist in isolation. They have meaning only when one knows the services to which they are attached." "Any claim for excessive rates can be couched as a claim for inadequate services and vice versa." The concept of rates must be defined broadly to ensure that states do not engage in backdoor rate-making under the guise of regulating other terms and conditions.

- **Marcus v. AT&T Corp.**, 138 F.3d 46, 61 (2d Cir. 1998). Where customers alleged that a telephone company fraudulently concealed its billing practice of rounding calls up to the next full minute, the state law claim for monetary relief was barred because judicial rate setting and "any judicial action which undermines agency rate-making authority" was precluded.

- **Wegoland Ltd. v. NYNEX Corp.**, 806 F. Supp. 1112 (S.D.N.Y. 1992). Where telephone company allegedly gave misleading financial information to support the inflated rates they requested and subsidiaries allegedly sold products and services at inflated prices, the Court dismissed plaintiffs' action for common law fraud because court would have had to determine the reasonable rate absent the carrier's fraud, a function the court found is reserved exclusively to the FCC under the Communications Act.

- **Day v. AT&T Corp.**, 63 Cal. App. 4th 325 (Cal. App. 1998). In an action for disgorgement of profits and injunctive relief against providers of telephone services and prepaid telephone

cards, alleging that defendants engaged in misleading and deceptive advertising in that they failed to disclose that telephone calls made with the prepaid cards would be charged by rounding up to the next full minute, the court rejected the claim for relief because it would "enmesh the court in the rate-setting process."

- **Rogers v. Westel-Indianapolis Co.**, No 49D03-9602-CP-0295 (Marion Super. Ct. (Ind.) July 1, 1996) ("remedy requested by Plaintiff will in fact require a change of rates and therefore this Court does not have jurisdiction").